

**COMMENTS of the National Consumer Law Center
to the
Office of the Comptroller of the Currency
12 CFR Part 41
Docket No. 04-09**

**Office of Thrift Supervision
12 CFR 571
No. 2004-16**

**Federal Reserve System
12 CFR 222
Docket No. R-1188**

**Federal Deposit Insurance Corporation
12 CFR 334
RIN 3064-AC81**

**National Credit Union Administration
12 CFR 717**

Proposed Fair Credit Reporting Medical Information Regulations

The National Consumer Law Center ("NCLC")¹ submits the following comments on behalf of its low income clients, as well as the Access Project², Consumer Federation of America³, Consumers Union⁴, National Association of Consumer Advocates,⁵ and U.S. Public

¹**The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Chi Chi Wu, Staff Attorney, and Margot Saunders, Managing Attorney, and are submitted on behalf of the Center's low-income clients.

² The **Access Project** is a national resource center for local communities working to improve health and health care access. It conducts community action research in cooperation with local leaders to improve the quality of relevant information needed to change the health system.

³ The **Consumer Federation of America** is a nonprofit association of over 300 consumer groups, established in 1968 to advance the consumer interest through research, education, and advocacy.

⁴ **Consumers Union** is the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

Interest Research Group⁶, regarding the proposed rule implementing the guidelines for the use of medical information under the Fair Credit Reporting Act (“FCRA”).⁷ This rule creates exceptions to the general prohibition in the FCRA forbidding creditors from obtaining or using medical information in connection with credit eligibility determinations.⁸ The FCRA⁹ requires the federal banking regulatory agencies and the National Credit Union Administration (“agencies”) to issue regulations strictly governing the limited use of medical information by the financial institutions they regulate (generally referred to in these comments as “banks”) in a manner consistent with the consumer protections of the Act, yet allowing appropriate exceptions.

We applaud the careful and specific way in which the agencies have crafted these regulations. Overall, we appreciate the direction and careful limitations articulated in this rule. We particularly approve of the two specific consumer protection requirements regarding the use of medical financial information, as permitted by the regulations, that the use of medical information must be “no less favorable” than other information, and that there is a flat prohibition against discrimination on the basis of medical condition.

Nevertheless, we do have a number of specific comments and suggestions regarding ways to ensure the consumer protections envisioned by Congress in the passage of this section. These suggestions address five areas:

1. The exclusion of individual business credit from the coverage under these regulatory protections is unjustified by the language or intent of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”).

2. The adoption of the “no less favorable standard” for the use of the medical financial information and the prohibition against discrimination on the basis of medical condition is excellent and entirely consistent with the language and intent of the FACT Act.

3. The *exclusions* from the rule should be changed to be considered *exceptions* from the rule, and should include an anti-discrimination standard as well.

4. The exclusionary rule for the use of medical information in consideration of debt cancellation or credit insurance products must be narrowed to an exception only permitting the information to be used at the appropriate time and for relevant products.

5. The reservation of authority for allowing exceptions by order of the agencies is too broad and contradicts the requirements of the FACT Act.

⁵ The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA’s mission is to promote justice for all consumers.

⁶ **The U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

⁷ § 604(g)(5) of the FCRA, 15 U.S.C. 1681b(g)(5).

⁸ § 604(g)(2) of the FCRA, 15 U.S.C. 1681b(g)(2).

⁹ § 604(g)(5).

Finally, we note with strong support the extensive comments submitted by Professor Joy Pritts of Georgetown University's Health Policy Institute, which address a number of issues not raised in this comment. We adopt the comments by Professor Pritts as a part of our comments.

1. The exclusion of individual business credit from the coverage under these regulatory protections is unjustified by the language or intent of the FACT Act.

The proposed rule includes a limitation for the medical information protections that is not supported or justified by the statute. The rule defines “eligibility, or continued eligibility for credit” as “the consumer’s qualifications or fitness to receive, or to continue to receive credit, ..., *primarily for personal, family, or household purposes.*” (emphasis added).¹⁰ The last phrase “primarily for personal, family, or household purposes” significantly limits the protections against use of medical information by banks to only consumer credit, leaving banks free to discriminate against individuals seeking business credit on the basis of medical condition.

This limitation on the medical information protections is not authorized, and indeed contradicts, the plain language of the statute. The statute states “a creditor shall not obtain or use medical information ... pertaining to *a consumer* in connection with *any determination* of the consumer's eligibility, or continued eligibility, for credit.”¹¹ In turn, “consumer” is defined in the FCRA simply as an “individual.”¹² Thus, nothing in the FACT Act or the FCRA limits the protections of sec. 604(g)(2) to consumer credit, i.e., credit for personal, family or household purposes.

Furthermore, such a limitation contradicts the FCRA’s definitions of “credit” and “creditor”, which specifically refer to the definitions of those same terms under the Equal Credit Opportunity Act (ECOA).¹³ The ECOA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.”¹⁴ The ECOA defines “creditor” in part as “any person who regularly extends, renews, or continues credit.”¹⁵ Neither definition is limited to consumer credit, and the ECOA clearly applies to individual business credit. It is important to note that Regulation B specifically covers business credit and applies the general prohibition against discrimination to business credit,¹⁶ although business credit is exempted from some requirements.¹⁷ Similarly, Congress intended that individuals seeking small business credit should be protected against discrimination on the basis of medical condition.

Congress specifically and explicitly chose to use the definition of credit and creditor under the ECOA, and not the more restrictive definition under the Truth in Lending Act, a statute

¹⁰ Proposed section __.30 (a)(2)(i).

¹¹ FCRA, § 604(g)(2), 15 U.S.C. 1681b(g)(2) (emphasis added).

¹² FCRA, § 603(c), 15 U.S.C. § 1681a(c).

¹³ FCRA, § 603(r)(5), 15 U.S.C. § 1681a(r)(5).

¹⁴ 15 U.S.C. 1691a(d).

¹⁵ 15 U.S.C. § 1691a(e).

¹⁶ Reg. B, 12 C.F.R. § 202.4; see Official Staff Commentary to Reg. B, 12 C.F.R. § 202.3-1 (“All classes of transactions remain subject to the general rule in § 202.4”).

¹⁷ See, e.g., Reg. B, 12 C.F.R. § 202.9 (modifying the ECOA adverse action notices for business credit).

which is limited to consumer credit.¹⁸ One of the primary reasons for applying the ECOA definition of credit to the FCRA, instead of the TILA definition, was to ensure that all the protection of the FCRA applied to individuals seeking business credit. The agencies' attempt to limit the protections against use of medical information for small business owners is contrary to Congressional intent.

It is in the context of credit for sole proprietorships or small businesses where the anti-discrimination provisions for medical conditions may be most important. Even some of the examples described in the proposed rule bear this out. Many of these examples involve a borrower meeting with or having conversations with a bank loan officer -- not a common situation for many forms of consumer credit, such as credit cards and auto loans. Where meetings or conversations with bank loan officers are more common is for small business credit applications.

2. The adoption of the “no less favorable standard” for the use of the medical financial information and the prohibition against discrimination on the basis of medical condition is excellent and entirely consistent with the language and intent of the FACT Act.

We strongly support the rule's requirement that medical financial information be treated no less favorably than other financial information, and that banks may not discriminate on the basis of medical condition. This provision, contained in proposed section _____.30(c), permits a bank to treat medically-related financial information the same as, or better than, similar non-medically related financial information. It also prohibits a bank from discriminating against consumers based on their underlying medical condition, treatment, or prognosis.

The primary reason consumers are opposed to banks' having access to their medical information is the concern that they will be discriminated against – or adversely affected – on the basis of the information. Congress intended to address these concerns and directed the agencies to promulgate a rule consistent with Congressional intent to restrict the use of medical information for inappropriate purposes.

Moreover, the establishment of a “no less favorable treatment” standard affords banks the discretion to treat medically-related debt and expenses more leniently than other types of debt. Creditors will sometimes treat medical debt more leniently than non-medical debt for the reason that medical debt often does not reflect a consumer's propensity to pay, because of the circumstances under which medical debt is incurred.¹⁹ For instance, delinquent medical debt reported to a credit reporting agency sometimes is the result of disputes between medical providers and insurers, where the consumer is “caught in the middle”.²⁰ By permitting banks the discretion to treat such medical debt more favorably than other types of debt, the proposed rule

¹⁸ The initial bills introduced in both the House and the Senate used the TILA definition of credit. House Rep. No. 108-263, at 3 (2003) and S.1753, 108th Cong. (2003).

¹⁹ Eve Tahmincioglu, Is Your Health Insurance Hurting Your Credit?, New York Times, May 12, 2002.

²⁰ Jennifer Steinhauer, Will Doctors Make Your Credit Sick?, New York Times, February 4, 2001; Consumer Federation of America and National Credit Reporting Association, Credit Score Accuracy and Implications for Consumers, December 17, 2002, at 31, available at www.consumerfed.org/121702CFA_NCRA_Credit_Score_Report_Final.pdf.

strikes a reasonable balance between allowing a bank accommodate consumers, and the need to protect consumers from discrimination based on their medical condition.

We strongly urge you to retain the requirement that banks treat medically-related debt no less favorably than other debt as well as the prohibition against discrimination of consumers based on their physical, mental, or behavioral health, condition or history, type of treatment, or prognosis.

3. The *exclusions* from the rule should be changed to be considered *exceptions* from the rule, and should include an anti-discrimination standard as well.

The proposed rule at __.30(a)(2)(i) excludes certain products or actions from the protections against obtaining or using medical information, by defining such products or actions as not involving “eligibility or continued eligibility for credit.” We are concerned that exclusions (B) through (D) of this subsection would permit banks in the credit context to discriminate against consumers on the basis of medical condition. To serve the purposes discussed in the Supplementary Information for which the exclusions were created, i.e., to allow banks to consider consumers claims for benefits or requests for accommodation on the basis of medical information, these exclusions should be merged with the exception for consumer request exception at __.30(d)(vi), and this exception should also include an anti-discrimination scheme similar to the one for medical financial information at __.30(c).

In general, anti-discrimination standards need to be carried through the entire credit transaction process, including delinquency and default procedures. For example, the Equal Credit Opportunity Act does so, prohibiting discrimination “with respect to any aspect of a credit transaction.”²¹ Indeed, decisions at every part of a credit transaction involve determinations of the consumer’s “continued eligibility for credit.” For example, forbearance agreements are a decision to re-write the terms of credit for a consumer, which is essentially a decision to continue the eligibility for credit. The decision to foreclose is the decision to terminate an account, and thus deny continued eligibility for credit.

In each of these servicing decisions, as well as for credit insurance/debt cancellation agreements/forbearances agreements/workouts, a bank should be permitted to use medical information to grant a benefit for which a claim is made, or accommodate the requests of a consumer on the basis of medical condition. The banks should also be free to deny relief on the basis that the triggering event has not happened, or to ignore medical information when considering requests for accommodation. However, banks should be prohibited from considering medical information when the consumer has not requested or made a claim for benefits, or to discriminate against the consumer because of medical information.

For instance, it should violate the provisions of section 604(g)(2), for a servicer to accelerate a loan when a consumer is delinquent on the basis that the consumer has a terminal disease, when the servicer would not accelerate a loan in a similar situation for a healthy consumer. It should also violate sec. 604(g)(2) for a bank to deny a property hazard insurance claim (which is a form of credit insurance) because of the consumer’s illness.

²¹ 15 U.S.C. § 1691.

Thus we would favor eliminating the exclusions at __.30(d)(vi), and bringing these issues under the framework of the “consumer request” exception at __.30(d)(vi) by expanding the exception to consumer requests and claims for benefits. This would bring all of these “claimed benefits” and “accommodation” exceptions into one framework, a much simpler and cleaner method of dealing with these issues. Furthermore, to prevent discrimination against the consumer, protections similar to those at __.30(c) should be added, i.e., the banks would be permitted to consider medical information in the context of credit insurance, forbearance, or servicing, but could not treat consumers “less favorably” than similarly-situated consumers or discriminate on the basis of medical condition.²²

4. The exclusionary rule for the use of medical information in consideration of debt cancellation or credit insurance products must be narrowed to an exception only permitting the information to be used at the appropriate time and for relevant products.

If the exclusion for debt cancellation and credit insurance is not modified as suggested above, the scope of medical information that a bank can obtain and use under this provision needs to be narrowed. First, we support Professor Pritts’ suggestion to reshape the exclusion as an exception and to limit the medical information obtained or used to only that information necessary to determine whether such provisions have been triggered. Banks should not be permitted to obtain or use medical information if the triggering event for the debt cancellation or credit insurance claim is non-medical, such as unemployment or divorce.

Second, the rule needs to prohibit banks from obtaining and using medical information to engage in the practice of post-claim underwriting. Post-claim underwriting occurs when creditors sell credit insurance to people who may not benefit from it: for example, disability insurance sold to homeowners who are disabled or already sick; credit life insurance sold to people who are not eligible because of pre-existing condition. When the consumer files a claim, the creditor then conducts an investigation of the consumer’s medical history to determine that the consumer never qualified for the insurance in the first place.²³

Thus, the rule should be limited to permitting the bank to obtain or use only that medical information which specifically and directly relates to the event or condition that the consumer asserts triggered the debt cancellation or credit insurance agreement. For example, if the product is credit life insurance, the only medical information necessary for the creditor to obtain and use

²² In the Supplementary Information, the agencies ask for comment as to whether the procedural aspects of the consumer request exception are too burdensome. We believe that the procedures are not too burdensome, but what is more important for this exception is that once banks have the medical information, it not be turned around and used to treat the consumer less favorably.

²³ Unlike ordinary insurance sales, with post-claim underwriting abuse, the consumer’s medical history is not reviewed *prior* to the issuance of insurance to determine eligibility for benefits (note that such pre-claim underwriting would be permissible under the exclusion for insurance). Instead, only after a claim is filed are eligibility factors such as medical condition checked to see grounds exist for denying coverage. Many policies simply provide that the policy will be canceled and the premium refunded if ineligibility is determined. The result of this arrangement is that creditors and insurance companies keep the premiums paid by ineligible debtors who never file an insurance claim, while refusing to pay on the same policies if claims are ever filed. For more on post-claim underwriting in credit insurance, see National Consumer Law Center, *The Cost of Credit: Regulation and Legal Challenges* §8.5.5 (2d ed. 2000 and Supp.).

is the confirmation of the consumer's death. The creditor should not be permitted to delve into the consumer's medical history after the policy has been written to determine whether the consumer had a medical condition that disqualified him from coverage.

5. The reservation of authority for allowing exceptions by order of the agencies is too broad and contradicts the requirements of the FACT Act.

The agencies have created an overly broad, unjustified, catch-all exception to the very important protections for medical information. At sec. ____30(d)(vii), the agencies have given themselves the power to create additional exceptions to the medical information protections by simply issuing an order. This overly broad reservation of authority is contrary the language and intent of the FACT Act.

The FACT Act specifically requires the agencies to go through rulemaking to establish exceptions to section 604(g)(2). Section 604(g)(5)(A) states “[e]ach Federal banking agency and [NCUA] shall, subject to paragraph (6) and *after notice and opportunity for comment*, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs” In fact, this subsection is even entitled “Regulations required.” Thus, it is contrary to the statutory language for the agencies to establish any other exceptions without going through the rulemaking process.

Some might argue that sec. 604(g)(2) does give the agencies the authority to establish exceptions with a mere order because it refers to exceptions “pursuant to paragraph (3)(c). . . .” Paragraph 3(c) in turn does mention the ability of the agencies and the FTC to establish exceptions by regulation or by order. However, paragraph 603(c) specifically deals with exceptions to the restrictions for affiliate-sharing of medical information. Thus, this exception does not deal with when a bank can obtain medical information, except when the information is from an affiliate, and it does not deal at all with the use of medical information.

Thus, the agencies are permitted to establish by order when a bank may obtain medical information from an affiliate.²⁴ It does not, however, permit the agencies to create additional exceptions permitting banks to use medical information or to obtain it from other non-affiliate sources, without going through the notice and comment procedures of rulemaking.

Finally, we note that there are no standards in ____30(d)(vii) for the agencies to create exceptions by order. Unlike the statute itself, there is no requirement that the exception be consistent with the intent of sec. 604(g)(2) to restrict the use of medical information or that the agencies make a determination that the exception is necessary and appropriate to protect legitimate operational, transactional, risk, or consumer needs. It is a standardless, wide open reservation of authority, which is not what the statute contemplates.

²⁴ In her comments, Professor Pritts of Georgetown analyses why the agencies should not create a broad exception allowing sharing of medical information between banks and their affiliate, a position that we also support.

Conclusion

We support what appears to be the general intent of the proposed rule, allowing banks to accommodate consumers on the basis of medical information while prohibiting banks from obtaining or using medical information to discriminate against consumers. Our suggestions are all based on that framework. We believe all consumers, including applicants for small business credit, deserve to be considered based on their creditworthiness, not their medical condition, when seeking credit.